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MAY 05 2005

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UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

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BAP No. NV-04-1436-BmKMa Bk. Nos. S-01-17904-BAM BILTMORE VACATION VILLAGE, S-01-22392-BAM LLC, (Jointly Administered) Debtor. Adv. No. S-03-1190-BAM In re: BILTMORE VACATION RESORTS, Debtor. SSL, LLC, Appellant, MEMORANDUM¹ TIMOTHY CORY, Chapter 7 Trustee, Appellee.

> Argued and Submitted on March 24, 2005 at Las Vegas, Nevada

> > Filed - May 5, 2005

Appeal from the United States Bankruptcy Court for the District of Nevada, Southern Division

Honorable Kathleen Thompson Lax, Bankruptcy Judge, Presiding

Before: BAUM2, KLEIN and MARLAR, Bankruptcy Judges.

This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

Hon. Redfield T. Baum, Sr., Bankruptcy Judge for the District of Arizona, sitting by designation.

Appellant SSL, LLC ("SSL") appeals the bankruptcy court's decision denying SSL's secured claim. We **AFFIRM**.

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FACTS

On August 1, 2001, an involuntary petition for relief under Chapter 7 of the Bankruptcy Code³ was filed against debtor Biltmore Vacation Village, LLC⁴ ("Biltmore"). On November 28, 2001, Biltmore Vacations Resorts, Inc., filed a Chapter 11 case, which was converted to Chapter 7 on March 27, 2002.

SSL provides engineering services and materials used in the construction of retaining walls. SSL submitted a bid for work on a project on Debtor's real property located in Bullhead City, Arizona. Although no written contract was entered into, SSL began working with a subsidiary of Biltmore, Sage Design Builders, Inc. ("Sage"). SSL produced some prefabricated retaining walls offsite, and drafted some engineering and elevation drawings. On December 31, 1999, SSL prepared and sent an invoice to Sage. The invoice⁵ totaled \$126,213.55 of which \$61,309.44 was for professional engineering services and \$64,904.11 for materials and construction. On May 24, 2002, SSL filed a proof of claim ("Claim") totaling \$111,349.49⁶, asserting

Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 and all rule references are to the Federal Rules of Bankruptcy Procedure ("Fed. R. Bankr. P."), Rules 1001-9036, which make applicable portions of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.").

⁴ This entity is also known as Biltmore Vacation Resorts, LLC; Dynamic Design Architecture, LLC; and Sage Design Builders, Inc.

The invoice is in a different amount than SSL's proof of claim.

The Claim is for \$111,349.49 secured by a mechanic's lien for the period November 4, 1999 through December 17, 1999. The Claim is broken down into principal of \$84,339.80; interest from December 31, 1999, through October 9, 2001, of \$15,462.30; and attorneys fees and costs of (continued...)

a lien against Debtor's real property based on Arizona's mechanic's lien law.

On July 16, 2003, the chapter 7 trustee, Timothy Cory, filed a "Complaint To Determine Validity Or Extent Of Liens" ("Complaint") against multiple creditors who had filed secured claims. The Complaint sought to reduce the amount of certain secured claims and to eliminate other secured claims entirely. Prior to trial, the trustee settled with some of the defendants, and SSL is the only defendant in this appeal.

A trial was held on the SSL Claim on May 18-19, 2004. The trustee argued that SSL's lien was not enforceable because SSL did not provide any benefit to the property, or because SSL did not comply with Arizona law in order to properly perfect its mechanic's lien. SSL argued that it properly complied with Arizona law and was entitled to a mechanic's lien in the amount of \$126,213.55, as contained on its invoice.

The bankruptcy court disallowed SSL's entire Claim by "Memorandum of Decision on Trial" ("Decision"), on June 24, 2004, and judgment was entered on August 18, 2004.

SSL's appeal is timely. The sole issue on appeal is whether the bankruptcy court properly denied a mechanic's lien for professional services.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. \$ 1334 and 157(b)(2)(A),(B),(K), and (O). This Court has jurisdiction under 28 U.S.C. \$ 158(a)(1).

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⁶(...continued)

^{\$11,424.89.} It is noted that the separately stated principal, interest, fees and costs total \$111,226.99, which is \$122.50 less than the amount of the Claim.

ISSUES

claim for professional services under Arizona's mechanic's lien

1 2 1) Did the bankruptcy court properly deny appellant's lien

law?

Whether the bankruptcy court should be affirmed on the 2) alternative ground that the professional services of SSL did not enhance the value of the estate property?

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STANDARD OF REVIEW

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No questions of law are at issue in this appeal; the parties' dispute is over the factual findings made by the

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bankruptcy court. We review the bankruptcy court's findings of

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fact for clear error. See Fed. R. Civ. P. 52(a); In re BCE West,

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L.P., 319 F.3d 1166, 1170(9th Cir. 2003).

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DISCUSSION

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In Arizona, a twenty day preliminary notice is required to perfect a mechanic's lien. Arizona Revised Statutes ("ARS")

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§ 33-992.01B provides:

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...every person who furnishes labor, professional services ... for which a lien otherwise may be claimed under this article shall, as a necessary prerequisite

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to the validity of any claim of lien, serve the owner ... with a written preliminary twenty day notice as

prescribed by this section.

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The preliminary twenty day notice must be served not later than twenty days after labor, professional services or materials are first furnished in order to perfect a mechanic's lien.

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ARS § 33-992.01C provides:

the jobsite

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The preliminary twenty day notice ... shall be given not later than twenty days after the claimant has first furnished labor, professional services ... to

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The bankruptcy court properly focused on when SSL first furnished professional services. SSL served its preliminary twenty day notice on the Debtor on December 13, 1999. SSL presented some evidence that the date it first furnished professional services was November 24, 1999. The court heard testimony from Scott Thompson, a principal of SSL, that an oral authorization to proceed with the work was given by Sage on November 24, 1999. If November 24, 1999, is the operative date, then the preliminary notice dated December 13, 1999, is timely because it was given nineteen days after SSL first furnished professional services.

However, the bankruptcy court reviewed other documentary evidence indicating that the date SSL first furnished professional services was November 4, 1999. The Debtor's own claim states that the debt was incurred starting on November 4, 1999. If November 4, 1999, is the operative date, then the preliminary notice dated December 13, 1999, is untimely because it was given thirty-nine days after SSL first furnished professional services. The bankruptcy court found:

Based on a consideration of the testimony and all of the documentary evidence admitted on SSL's claim in this case, this court finds that SSL first furnished labor, services and materials on the Project no later than November 4, 1999.

Aplt. App. at 47.

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Arizona law also provides for a mechanic's lien for particular services provided within the preceding twenty days of the filing of the preliminary notice. ARS § 33-992.01E provides:

If labor, professional services, ... are furnished to a jobsite by a person who elects not to give a

preliminary twenty day notice as provided in subsection B of this section, that person is not precluded from giving a preliminary twenty day notice not later than twenty days after furnishing other labor, professional services, ... to the jobsite. The person, however, is entitled to claim a lien only for such labor, professional services, ... furnished within twenty days prior to the service of the notice and at any time thereafter.

The bankruptcy court considered this, but, based on the evidence presented was unable to allocate any particular services on the Claim to the twenty day period prior to the preliminary notice. The bankruptcy court held:

In theory, then, SSL might be able to support a mechanics lien claim for some discrete professional services rendered within the 20 days prior to December 13, 1999. They did not do so and the evidence presented at trial does not support an allocation of the claim either by timing or by amount incurred (emphasis added).

Aplt. App. at 48.

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Α.

The Bankruptcy Court's Decision Denying SSL'S Mechanic's Lien Claim Was Not Clearly Erroneous.

This Court will not disturb a lower court's findings of fact unless we are left with the definite and firm conviction that a mistake has been made. See In re Banks, 263 F.3d 862, 869 (9th Cir. 2001). Here, the bankruptcy court held an evidentiary bench trial and made credibility determinations of the witnesses for both parties. Special deference is paid to a trial court's credibility findings. See McClure v. Thompson, 323 F.3d 1233, 1241 (9th Cir. 2003); Fed. R. Bankr. P. 8013. Nothing in the record causes this court to believe that the bankruptcy court's factual findings were not plausible based on the evidence presented. The bankruptcy court's findings that 1) November 4,

1999, is the date that SSL first furnished professional services and, 2) that the evidence does not support an allocation of services rendered within twenty days of the preliminary notice, do not leave this court with a firm and definite conviction that a mistake has been committed.

Even if this court thought another view of the evidence was permissible, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." See United States v. Elliott, 322 F.3d 710, 715 (9th Cir. 2003). As has been graphically described, "[t]o be clearly erroneous, a decision must strike us more than just maybe or probably wrong; it must ... strike us as wrong with the force of a five-week-old, unrefrigerated dead fish." See Hayes v.

Woodford, 301 F.3d 1054, 1067 n.8 (9th Cir.2002) (internal quotation omitted).

The bankruptcy court's decision is entirely plausible and is in accord with the entire record in this matter. SSL failed to timely serve its twenty day notice and failed to provide sufficient evidence to claim a lien for services performed within twenty days of the notice. Therefore, the bankruptcy court correctly disallowed SSL's Claim under Arizona's mechanic's lien law.

In addition, the record is unclear as to whether SSL timely filed suit to foreclose on the lien as required by ARS \S 33-998. If ARS \S 33-998 was not complied with, then the lien would also be avoided on these alternative grounds. When questioned at oral argument, SSL's counsel advised that a suit was timely filed under ARS \S 33-998.

The Record Supports Affirming On The Alternative Ground That SSL'S Professional Services Did Not Enhance The Value Of Estate Property.

In reviewing decisions of the bankruptcy court, we may affirm on any ground supported by the record. See Forest

Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003). Even if the lower court did not reach the issue, we can affirm on alternative grounds if supported by the record. See Keyser v. Sacramento City Unified Sch. Dist., 265 F.3d 741, 750 (9th Cir. 2001).

Here, the trustee argues that SSL did not deliver professional services to the Debtor nor did SSL's services bestow a benefit to the property. The trustee cites to Fortune v.

Superior Court, 768 P.2d 1194 (Ariz. Ct. App. 1989) and Michael

Weller, Inc. v. Aetna Cas. & Sur. Co., 614 P.2d 865 (Ariz. Ct. App. 1980) for the principle that, under Arizona law, a mechanic's lien for services must enhance the value of the property. The Fortune court held that mechanic's liens are:

[1] imited to the value of the labor or services actually furnished at the time the lien is filed (and which enhanced the value of the land)... (emphasis added).

Fortune, 768 P.2d at 1197. There is no evidence in the record that SSL provided materials or services which enhanced the value of the property. In determining that no value was added to the property relating to the portion of SSL's invoice for materials and construction, the bankruptcy court noted that:

It is <u>undisputed</u> that no retaining walls were built on the Property, that no construction of retaining walls

was commenced on the Property, and that no materials relating to the construction of retaining walls were delivered to the Property by SSL (emphasis added).

Aplt. App. at 47. For professional services, the bankruptcy court determined that:

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There is no evidence that the engineering calculations were delivered to Biltmore or any agent of Biltmore. (Ex. M) There is some evidence that the elevations drawings were made available to the general contractor on the Project. (Ex. M)

Aplt. App. at 46. The bankruptcy court also considered evidence from the architect on the project that no engineering drawings or services of SSL were used on the property. Aplt. App. at 91, 138. Although some elevation drawings were made available, nowhere in the record does SSL provide evidence that those drawings or any other professional services enhanced the value of the estate property. Therefore, we also affirm on the alternative ground that SSL's mechanic's lien claim fails because there was no enhancement to the value of the estate property.

CONCLUSION

For the foregoing reasons, the judgment of the bankruptcy court is **AFFIRMED**.